

# Town of Concord Abandons Another Part of Estabrook Lawsuit

Jan 11, 2020

The Town as of January 10, 2020 has announced they will abandon yet another part of the lawsuit regarding the Estabrook Trail. The Town now admits that it does not have any documentation that Estabrook Trail at the end of Estabrook Road was ever laid out or accepted as a Public Way. This follows the Town's abandonment in October 23, 2019 of claims of access rights due to "long standing public use."

The lawsuit is about whether the admitted owners of the land have a right to regulate it as a nature preserve, or whether the public has unlimited rights to use it as a regional dog park. The dispute centers around who has control of a trail that leads only into private lands. The Town took the unprecedented action of suing a number of landowners and Harvard University in October of 2017 without warning, despite the fact that the owners have continued to allow public use of their land.

The core claim by the Town, that the public retained access rights into the owner's land because the Trail was a public road prior to its discontinuance in 1932, was based on the Town's assertion that it had legal documentation of the Trail as a public way. When the Town first asserted this claim in 2016, the landowners did research that showed that the documentation the Town had produced was actually documentation of Monument Street, and provided that information to the Town in early 2017. Nevertheless, the Town continued to claim the documentation they had was of Estabrook Trail for the next 33 months. Only now, nearly three years and nearly a million dollars of taxpayer money later, has the Town finally admitted that *the landowners were correct*- and the documentation was of Monument Street. The Town has also admitted that the landowners are the owners of the Estabrook Trail.

The Town still suggests that the northernmost section of Estabrook Trail on Harvard's land may be documented, but only as part of a private way located primarily in Carlisle. The Town admits this section does not include the southern part of the Trail.

The Town had laid out their claim in a report written by a hired expert, which they introduced in April of 2019. On January 10, 2020 the Town issued a legal case document called an interrogatory supplement *recanting that claim*. Now, instead of claiming to have the required documentation for the Trail between the defendant's homes, the Town intends to rely on the claim that "it must have been a public way" based on a few times in documents when it has been referred to as a "Town Way".

However, the courts have been clear that references to a road or trail as a "Town Way" do not make it a public way. A way is only public when it has been established and documented through the prescribed legal process. This issue has been definitively settled in *Cowls v Woicekoski* (1979), *Miguel v Fairhaven* (2017), and *Rivers v Warwick* (1994).

Alternatively, the Town has suggested it may claim that walking by Thoreau and Emerson in the woods in the 1800s somehow caused the Trail to become a public way. No court has ever found such circumstances have caused a way to become a public way. The evidence instead

shows that much of Trail was made by the private landowners, for their own use, in the early 1700s.

Even if the Town were to demonstrate that the Trail was some kind of old public way, the Trail was formally discontinued as a public way in 1932 in response to a petition by the landowners. The Town has tried to argue that it retains a public easement and only ended its maintenance obligation in 1932, but the evidence shows the Town never had any public easement to begin with. Furthermore, all other similarly discontinued roads in Concord and neighboring Towns have been treated as private, and are blocked, overgrown, gated, built-over, and/or posted "No Trespassing". Surveyors, engineers, conveyance attorneys, and planning boards have uniformly treated such discontinued roads as wholly private around the Commonwealth. None of such roads have any public easement, nor is there any record of any Town in Massachusetts ever claiming a public easement on such a discontinued road.

The Town of Concord is claiming that all other towns, all conveyance attorneys, all land surveyors, and all planning boards have been wrong about this kind of discontinuance for over 80 years and that trails like this have a public easement.

Estabrook Trail leads to no public lands; the landowners intend to protect their lands as a nature preserve and continue to assert that they, like any private landowners, have the right to manage the nature and volume of public use of their land.

Additional information available at [www.estabrookfacts.org](http://www.estabrookfacts.org)